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CHARLES ELMORE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1936

No. 161

LIGGETT AND MYERS TOBACCO CO.,
Petitioner,

vs.

THE UNITED STATES.

No. 162

THE COMMONWEALTH OF MASSACHUSETTS,
Petitioner,

vs.

THE UNITED STATES.

No. 163

LIGGETT AND MYERS TOBACCO CO., ON BEHALF OF THE COMMONWEALTH OF MASSACHUSETTS,
Petitioner,

vs.

THE UNITED STATES.

PETITION FOR WRITS OF CERTIORARI TO THE COURT OF CLAIMS AND BRIEF IN SUPPORT THEREOF.

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PETITION FOR WRITS OF CERTIORARI TO THE COURT OF CLAIMS.

Liggett and Myers Tobacco Co., The Commonwealth of Massachusetts, and Liggett and Myers Tobacco Co. on behalf of The Commonwealth of Massachusetts severally pray

that writs of certiorari issue to review the judgments of the Court of Claims of the United States ordered to be entered in the above causes on April 6, 1936 (R. 26-27), motions for new trial being denied June 9, 1936 (R. 27).

Opinion Below.

The opinion of the Court of Claims (R. 23) is reported 13 F. Supp. 143. See also 14 F. Supp. 543.

Jurisdiction.

The judgments of the Court of Claims were ordered to be entered April 6, 1936, and motion for new trial was denied June 9, 1936. The jurisdiction of this Court is invoked under Section 3(b) of the Act of February 13, 1925 (43 Stat. 939; United States Code Annotated, Sec. 288).

Question Presented.

The principal question presented is whether the tax imposed by the Federal Revenue Act of 1926 in Section 401 upon tobacco sold by the manufacturer or removed for consumption or sale can, under constitutional limitations, apply to tobacco sold by the manufacturer to The Commonwealth of Massachusetts for free distribution in institutional treatment of the inmates of an insane hospital owned and operated by the Commonwealth.

Statute Involved.

The principal portion of the Revenue Act of 1926 involved is Section 401(a) (U. S. Code, Title 26, Sec. 761) which reads as follows:

> "Upon all tobacco and snuff manufactured in or imported into the United States, and sold by the manufacturer or importer, or removed for consumption or sale, there shall be levied, collected, and paid a tax of

18 cents per pound, to be paid by the manufacturer or importer thereof. Snuff flour when sold or removed for use or consumption shall be taxed as snuff and shall be put up in packages and stamped in the same manner as snuff."

Other provisions relative to the tax upon tobacco are to be found in Chapter 14 of Title 26 of the U. S. Code.

Statement.

The Court of Claims made the following special findings of fact (R. 20):

"The Liggett and Myers Tobacco Company is a corporation engaged in the business of dealing in and manufacturing tobacco and pursuant to law maintains a bonded warehouse for storing manufactured tobacco. The established internal-revenue procedure was to affix the stamps required by law to be placed upon the manufactured tobacco before the tobacco was removed from the factory. About January 6, 1932, the plaintiff (Liggett and Myers) received an order from the Commonwealth of Massachusetts, through its purchasing agent, for four boxes of manufactured tobacco totaling ninety-six pounds net weight to be delivered to the Boston State Hospital, owned and operated by the Commonwealth of Massachusetts in that State. The plaintiff had in its bonded warehouse the tobacco so ordered in packages to which had been affixed the internal revenue stamps required by law, duly canceled. The aggregate amount of the stamps so canceled was $17.28 and pursuant to the order received the tobacco was delivered about January 19, 1932, to the Boston State Hospital. On the day of shipment the plaintiff sent a bill to the Boston State Hospital in the sum of $30.62, being the price of the tobacco including the tax paid by internal revenue stamps. This bill was paid by the Commonwealth of Massachusetts.

"The tobacco so shipped and received by the hospital was distributed free to patients thereof under the

authority from the law of Massachusetts and in the course of institutional treatment of the patients."

Upon motion of the petitioners the findings were subsequently amplified by the following addition (R. 21):

> "The Boston State Hospital is maintained by the Commonwealth of Massachusetts for care and treatment of those having mental diseases. Institutional treatment of the insane has existed for several centuries although the early treatments were largely limited to the confinement of the violently insane. State treatment of the mentally diseased at public expense has existed in the United States and in the Commonwealth of Massachusetts for many years, but a few States provide practically no such facilities. The Boston State Hospital is useful in the maintenance of public welfare and order in the Commonwealth of Massachusetts. The power of restraining patients is conferred upon the hospital by the State. While there are private hospitals for the care of the insane located and operated in the State, they are conducted for profit and the average patient does not have the means to pay their charges. In the Boston State Hospital, patients pay if they are able, but if not pay nothing. The hospital performs a useful service."

In the case of *Liggett and Myers Tobacco Co.* v. *The United States,* numbered 42,107 in the Court of Claims, the Court of Claims made further findings as follows (R. 22):

> "About January 25, 1932; the plaintiff filed with the Collector of Internal Revenue at St. Louis, Missouri, a claim for the sum of $17.28, the amount of the stamps used in payment of the tax on the tobacco shipped to the hospital, alleging as the basis for the claim that the tax so sought to be recovered was paid by the plaintiff on tobacco sold and delivered by it to the Commonwealth of Massachusetts which was by said State, in pursuance of the laws thereof, distributed without charge to inmates of a State owned and operated insti-

tution as an instrumentality of government. The claim for refund was disallowed."

In the cases of *The Commonwealth of Massachusetts* v. *The United States* and *Liggett and Myers Tobacco Co. on behalf of The Commonwealth of Massachusetts* v. *The United States*, numbered, respectively, 42,411 and 42,412, in the Court of Claims, the Court of Claims made further findings as follows (R. 22):

> "In each of these cases the plaintiff therein filed a claim for refund in due time and in proper form upon substantially the same grounds as were stated in the claim for refund filed in No. 42,107."

Errors Relied On.

(1) The Court of Claims erred in holding that the Boston State Hospital, found by the court to be owned, operated and maintained by The Commonwealth of Massachusetts for the care and treatment of those having mental diseases, was not such an instrumentality of State government as is entitled to immunity from taxation by the Federal government.

(2) The Court of Claims erred in holding that this case is not controlled by the principles enunciated by this Court in *Ohio* v. *Helvering*, 292 U. S. 360; *Helvering* v. *Powers*, 293 U. S. 214; and *United States* v. *California*, 297 U. S. 175, and in holding that it was controlled by an unwarranted interpretation of dictum contained in *Flint* v. *Stone Tracy Co.*, 220 U. S. 107.

(3) The Court of Claims erred in not holding that the tax collected in the instant cases could not, by reason of constitutional limitations, apply in the case of tobacco sold to the Commonwealth of Massachusetts for consumption by it through free distribution in institutional treatment in a

hospital owned and operated at public expense by the Commonwealth for the care and treatment of the mentally diseased.

(4) The Court of Claims erred in not holding that the tax collected in the instant cases should have been refunded and in not entering judgment for the plaintiff in one of the pending cases.

Reasons for Granting the Writs.

This Court should review the judgments of the Court of Claims in these cases for the reason that they decide a Federal question in a way in conflict with the principles enunciated by this Court in *South Carolina* v. *United States,* 199 U. S. 437; *Clallam County* v. *United States and United States Spruce Production Corporation,* 263 U. S. 341; *Ohio* v. *Helvering,* 292 U. S. 360; *Helvering* v. *Powers,* 293 U. S. 214, and *United States* v. *California,* 297 U. S. 175. The judgments are also in conflict with the decisions of this Court in *McCulloch* v. *Maryland,* 4 Wheat. 316; *Collector* v. *Day,* 11 Wall. 113; *United States* v. *Baltimore & Ohio R. Co.,* 17 Wall. 322; *Pollock* v. *Farmers Loan and Trust Co.,* 157 U. S. 429; *Home Savings Bank* v. *Des Moines,* 205 U. S. 503; *Farmers and Mechanics Savings Bank* v. *Minn.,* 232 U. S. 516; *Gillespie* v. *Oklahoma,* 257 U. S. 501; *Northwestern Mutual Life Insurance Co.* v. *Wisconsin,* 275 U. S. 136; *Panhandle Oil Co.* v. *Knox,* 277 U. S. 218; *Indian Motocycle Co.* v. *United States,* 283 U. S. 570, and *Graves* v. *Texas Company,* U. S. Supreme Court, Law. Ed. Advance Opinions 1935-1936, p. 824.

The principle of immunity of Federal instrumentalities from burden by the States upon the one hand and the immunity of instrumentalities of the State from burden by the Federal government upon the other is well established.

In the instant cases the levy and collection of a tax upon tobacco sold to the Commonwealth of Massachusetts imposed a direct burden upon it. The principle upon which the decision in *Indian Motocycle Co.* v. *United States, supra,* rests extends to the imposition here involved. But even if the tax in question were not to be regarded as having its incidence in the sale of the tobacco, but rather in the removal for consumption or sale, the case would still be governed by the decision of this Court in *Graves* v. *Texas Company, supra.* The Court of Claims assumes that the test as to whether or not a function performed by a State is entitled to immunity from Federal burden depends upon whether the State alone has capacity to perform it. Such an assumption is without warrant. No decision of this Court has ever so held and the adoption of so narrow a rule is not in accord with the test which this Court in its most recent decisions has indicated should be followed in determining what functions performed by the States will be regarded as immune and what functions will be regarded as not immune. *Ohio* v. *Helvering, Helvering* v. *Powers,* and *United States* v. *California, supra,* all indicate that the test turns upon whether the function is usual, customary or traditional upon the one hand or whether it is upon the other hand a proprietary function whereby the State enters the market place and engages in business which constitutes a departure from usual governmental functions to which the Federal taxing power would normally extend. Even assuming it would not be competent for this Court to take judicial notice of the necessity of the States caring for their insane, the findings of fact by the Court of Claims indicate that the maintenance of such institutions as that here involved are usual, customary and traditional functions of State governments, and that they help to maintain public welfare and order. It is implicit, if not expressly stated

in the findings, that the institution is conducted at public expense and not for profit nor as a proprietary enterprise.

If the Court of Claims erred, as is contended, in holding that the function of State government here involved was not of a character entitled to immunity from Federal taxation, it erred in ordering judgments entered for the United States in each of the cases, for the tax here collected could not constitutionally apply to tobacco sold to the Commonwealth for such a function. *McCulloch* v. *Maryland,* 4 Wheat. 316; *Panhandle Oil Co.* v. *Knox,* 277 U. S. 218; *Indian Motocycle Co.* v. *United States,* 283 U. S. 570; *Graves* v. *Texas Company,* U. S. Supreme Court, Law. Ed. Advance Opinions 1935-1936, p. 824.

WHEREFORE, it is respectfully submitted that these petitions should be granted.

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BRIEF IN SUPPORT OF PETITION.

Opinion Below.

The opinion of the Court of Claims (R. 23) is reported in 13 F. Supp. 143. See also 14 F. Supp. 543.

Jurisdiction.

The judgments of the Court of Claims were ordered to be entered April 6, 1936 (R. 26-27), and the motions for new trial were denied June 9, 1936 (R. 27). The jurisdiction of this Court is invoked under Section 3 (b) of the Act of February 13, 1925 (43 Stat. 939); United States Code Annotated, Sec. 288.

Question Presented, Statute Involved, Specification of Errors and Statement of the Cases.

A statement of the question presented, the statute involved, the specification of errors to be urged, and a statement of the cases will be found in the foregoing petition.

Argument.

The decision of the Court of Claims in the cases at bar rested solely upon the ground that the function performed by The Commonwealth of Massachusetts through the instrumentality of the Boston State Hospital is not of such a character as to entitle the Commonwealth to immunity from Federal taxation with respect to it. Having found as a matter of fact that the institution involved is owned and maintained by the Commonwealth for the care and treatment of those having mental diseases and that it is useful in the maintenance of public welfare and order in the Commonwealth, the court ruled as a matter of law, in the last

paragraph of its opinion, that the institution "not being essential to the execution of the governmental functions of the State and not one which the State only could carry on, it follows that no immunity from taxation has been established." The court relies upon the following dictum in the case of *Flint* v. *Stone Tracy Co.*, 220 U. S. 107, 172, as supporting its conclusion: "The true distinction is between the attempted taxation of those operations of the States essential to the execution of its governmental functions, and which the State can only do itself, and those activities which are of a private character." The Court of Claims sets forth in italics the words "and which the State can only do itself." It is submitted that in the first place the quoted language is pure dictum and in the second place the conclusion reached by the Court of Claims is unsupported even by the dictum when interpreted in the light of the entire context. The phrase set forth in italics by the Court of Claims was not essential to the decision in the case of *Flint* v. *Stone Tracy Co., supra.* All that was actually held by the Supreme Court with respect to this particular aspect of the case was simply that certain public service corporations neither owned nor managed by a State and engaged in business with a view to private gain were not immune from Federal taxation even though performing functions of a quasi-public character. Moreover, it is unreasonable to suppose that the portion of the dictum italicized by the Court of Claims was intended to be read alone and to be construed so narrowly as to mean that if a function performed by a State is of such a character that it is physically or constitutionally possible for the State to leave it unperformed, then no matter how customary and well established as a function of government it may be, the State is entitled to no immunity with respect to it. Such a construction loses sight of the con-

trasting classification referred to by the Supreme Court in the same sentence as "those activities which are of a private character" and leaves a large residuum of functions that would fall into neither classification outlined as the rule of distinction in the dictum. Even were such an improbably narrow construction assumed, it is submitted that it would be error to consider that the basic function of protecting society from the acts of the insane is unnecessary. The State alone has the power to confine. It is a matter of common knowledge that in the development of the basic objective greater emphasis has come to be laid upon the care and treatment of the insane, now often referred to as the mentally diseased, so that mere confinement no longer obtains among civilized peoples. But the need for the accomplishment of the basic purpose is none the less great.

But, however this may be, it is submitted that the decisions of this Court, and particularly the more recent decisions, indicate that so narrow a limitation is not to be adopted. These cases point to the test as being between the usual and customary functions of government upon the one hand and those, upon the other hand, of a proprietary nature where the State invades the market place or fields customarily occupied by private enterprise. In *Ohio* v. *Helvering*, 292 U. S. 360 at page 369, this Court says: "When a State enters the market place seeking customers it divests itself of its quasi-sovereignty *pro tanto* and takes on the character of a trader, so far, at least, as the taxing power of the Federal government is concerned." Again, in the case of *Helvering* v. *Powers*, 293 U. S. 214 at page 225, this Court indicates that the test is whether the State is withdrawing "sources of revenue from the Federal taxing power by engaging in businesses which constitute a departure from usual governmental functions

and to which, by reason of their nature, the Federal taxing power would normally extend." Again, in *United States* v. *California*, 297 U. S. 175 at page 184, this Court says:

> "The analogy of the constitutional immunity of state instrumentalities from federal taxation, on which respondent relies, is not illuminating. That immunity is implied from the nature of our federal system and the relationship within it of state and national governments, and is equally a restriction on taxation by either of the instrumentalities of the other. Its nature requires that it be so construed as to allow to each government reasonable scope for its taxing power, see Metcalf & Eddy *v.* Mitchell, 269 U. S. 514, 522-524, which would be unduly curtailed if either by extending its activities could withdraw from the taxing power of the other subjects of taxation traditionally within it. Helvering *v.* Powers, 293 U. S. 214, 225; Ohio *v.* Helvering, 292 U. S. 360; South Carolina *v.* United States, 199 U. S. 437; see Murray *v.* Wilson Distilling Co., 213 U. S. 151, 173, explaining South Carolina *v.* United States, *supra*. Hence we look to the activities in which the states have traditionally engaged as marking the boundary of the restriction upon the federal taxing power. But there is no such limitation upon the plenary power to regulate commerce. The state can no more deny the power if its exercise has been authorized by Congress than can an individual."

Obviously the issue in the instant cases involves "immunity of State instrumentalities from Federal taxation", not "the plenary power to regulate commerce", and the rule indicated by this Court as applying to cases involving the former subject matter is applicable in the instant cases.

Moreover, it is amply clear that, in the application of the rule of immunity, such immunity has not been denied in cases where the function could conceivably be performed in any other way than through the agency of government.

In the case of *Clallam County* v. *United States and United States Spruce Production Corporation*, 263 U. S. 341, immunity from State taxation was extended to a corporation organized by the United States and engaged in the production of airplane lumber. The lumber so produced was used to make airplanes which in turn were intended for use in the prosecution of the World War. To engage in war is undoubtedly a governmental function. The production of the food, clothing, equipment and even munitions essential for supplying the fighting forces which prosecute the war has in the main been left to private enterprise and this was largely true even of the World War. Certainly it could not be said that the government alone could perform the function of producing spruce lumber for aircraft even if it be assumed that the government, because of the exigencies of the times, thereby secured a supply more expeditiously and at lower cost. If the element of difficulty in procuring an adequate supply of spruce is to be regarded as a material factor, then the State stands in as strong a position in the instant cases as the Federal government in the *Clallam County* case. The practical result of the Commonwealth's failing to maintain such institutions as the one in question would be that hundreds of mad men and women would be loosed upon society. That the State government not only confines but cares for and treats the inmate in a manner consistent with the best thought of the time does not make the function any the less governmental in character. In early times war was prosecuted with ancient weapons such as the javelin. In the prosecution of war today government adopts the most efficient means at its command, as, for instance, the airplane. In early times the State maintained order and protected society within its borders by confining its criminal and its insane in a manner that today would be regarded as cruel and

inhumane. Today more efficient means are adopted for the accomplishment of the same basic objective of maintaining order and protecting society against crime and insanity. Can it be assumed that it is any the less the function of government to protect society from that which menaces it from within its borders than to protect from that which menaces from without?

Again, in the case of *Panhandle Oil Co.* v. *Knox*, 277 U. S. 218, the Supreme Court held invalid a State imposition which bore upon a veterans hospital maintained by the Federal government. Maintenance of a veterans hospital is not essential in the sense that the government alone can maintain it, nor is the care of veterans essential in the sense that the government alone can care for them. Probably their care could be contracted for far more easily than the care of the insane. Moreover, in the case of the insane the State alone has authority to confine and subject to treatment. In this sense the test suggested in the italicized language quoted by the Court of Claims from the case of *Flint* v. *Stone Tracy Co.* indicates that the Boston State Hospital is better qualified for immunity than a veterans hospital.

In *Indian Motocycle Co.* v. *United States*, 283 U. S. 570, the maintenance of law and order by a political subdivision of Massachusetts through the medium of a police force equipped with motorcycles was considered an instrumentality entitled to immunity from Federal taxation. It is submitted that the institution which confines the insane is no less essential to the preservation of order than the officer who might apprehend the insane person if he escaped and return him to the place of confinement.

Even the maintenance of an ordinary hospital for the conservation of the public health has been considered by the great weight of authority to be a governmental function.

City of McAllen v. *Gartman*, 81 S. W. (2d) 147, and long list of authorities there cited. Such also was the decision in *Mallory* v. *White*, 8 F. Supp. 989, in which case it was further held that the fact that some of the patients who were able paid the whole or a part of the cost of the service did not prevent the application of the rule of immunity.

Finally, applying the test as outlined in the recent decisions of this Court, it is clear that the function here involved is a customary and usual function of government. Even if this Court were not to take judicial notice of the facts, the Court of Claims has found that the power to restrain the insane is derived from the State, that institutional treatment of the insane has existed for centuries although early treatments were largely limited to the confinement of the violently insane, and that State treatment of the mentally diseased at public expense has existed in the United States and in the Commonwealth for many years. That the institution maintained by the Commonwealth for the insane was not conducted as a proprietary enterprise nor for profit is implicit in the findings of the Court of Claims. It further appears that the tobacco was properly used in the institutional treatment of the patients, no charge being made therefor to the patient. It is accordingly submitted that the Court of Claims erred in ruling that the instrumentality here involved was not of such a nature as to entitle the Commonwealth to immunity from Federal taxation with respect to it.

If, as is here contended, the function performed by The Commonwealth of Massachusetts in the care of the insane is entitled to immunity from Federal taxation, the question which the Court of Claims did not find it material to determine, namely, whether the rule of immunity was violated by the particular tax here collected, becomes material. It is submitted that the rule was so violated.

It is well established that on the one hand a State may not burden Federal instrumentalities nor may the Federal government, on the other hand, burden the instrumentalities of the States. *McCulloch* v. *Maryland*, 4 Wheat. 316; *Collector* v. *Day*, 11 Wall. 113; *United States* v. *Baltimore & Ohio R. Co.*, 17 Wall. 322; *Pollock* v. *Farmers Loan & Trust Co.*, 157 U. S. 429; *Home Savings Bank* v. *Des Moines*, 205 U. S. 503; *Farmers and Mechanics Savings Bank* v. *Minnesota*, 232 U. S. 516; *Gillespie* v. *Oklahoma*, 257 U. S. 501; *Northwestern Mutual Life Insurance Co.* v. *Wisconsin*, 275 U. S. 136; *Panhandle Oil Co.* v. *Knox*, 277 U. S. 218; *Indian Motocycle Co.* v. *United States*, 283 U. S. 570.

The statute under which the tax was paid imposes a tax upon "all tobacco and snuff manufactured in or imported into the United States, and sold by the manufacturer or importer, or removed for consumption or sale". It is clear that no tax is to be imposed upon mere manufacture or importation under the statute. The terms "manufactured" and "imported" are descriptive of the tobacco which when "sold" or "removed for consumption or sale" is subject to the tax. Sale or removal for consumption or sale is an essential element and there can be no incidence of the tax until sale or removal for consumption or sale takes place. In the instant cases, about January 6, 1932, the Liggett and Myers Tobacco Co. received an order from The Commonwealth of Massachusetts, through its purchasing agent, for four boxes of tobacco to be delivered to the Boston State Hospital, owned and operated by The Commonwealth of Massachusetts in that State. The Liggett and Myers Tobacco Co. had in its bonded warehouse the tobacco so ordered in packages to which had been affixed the internal revenue stamps required by law, duly canceled. The aggregate amount of the stamps so canceled was $17.28, and pursuant to the order received the tobacco

was delivered about January 19, 1932, to the Boston State Hospital. On the day of shipment the Liggett and Myers Tobacco Co. sent a bill to the Boston State Hospital in the sum of $30.62, being the price of the tobacco including the tax paid by internal revenue stamps. This bill was paid by The Commonwealth of Massachusetts. The date of affixation of stamps relates solely to the payment of the tax and is without significance as to its incidence. The stamps had been affixed prior to either sale or removal and such affixation may have been in anticipation either of sale or removal for consumption or sale. The coincident act of removal and shipment completed the sale. The case is within the principle laid down in the case of *Indian Motocycle Co.* v. *United States,* 283 U. S. 570. In that case it was held that the sale of an article to a State agency for use in its police service was not subject to taxation by the United States. This Court there said, at page 579: "The maintenance of a police service by such a State agency, like the maintenance of a Coast Guard service by the United States, is a governmental function; and that function extends—in one instance as much as in the other—to the purchase of equipment and supplies needed to render the particular service efficient. Under the constitutional principle the exertion of such a function by a State or a State agency has the same immunity from Federal taxation that like exertions by the United States or its agencies have from State taxation. Here the tax is laid directly on the sale to a governmental State agency of an article purchased for governmental purposes. The sale and purchase constitute a single transaction, in which the purchaser is an essential participant. Without that participation the sale could not be effected. Thus, the transaction falls within the class which the United States cannot tax consistently with the constitutional principle." As was said in *Panhandle Oil Co.* v. *Knox,* 277 U. S. 218, at page 222,

and reiterated in the *Indian Motocycle Co.* case at page 578: "It is immaterial that the seller and not the purchaser is required to report and make payment to the State. Sale and purchase constitute a transaction by which the tax is measured and on which the burden rests." Shipment of the tobacco pursuant to the order received from The Commonwealth of Massachusetts necessitated payment of the tax. The effect of the imposition upon the purchaser of the tobacco was accordingly direct and in this instance, the purchaser being The Commonwealth of Massachusetts, it is submitted that the levy was invalid.

It was contended by the respondent in argument before the Court of Claims that the tax invariably had its incidence in removal, never in sale, and the practice to require affixation of stamps only upon removal was cited. So distorted an interpretation of the express language of the taxing act is without warrant. The law expressly lays a tax on sale as well as on removal for consumption or sale and any Federal practice which deliberately ignores the laying of the tax on the sale or that ignores the fact that the statute imposes the tax upon removal, only when the removal is for consumption or sale, would have no effect upon the interpretation of the statute. The language of the statute is clear. There is no ambiguity in it. Departmental practice, no matter how long established, cannot make the law but can only throw light upon the law where there is uncertainty in the language employed by the law-making body. *Louisville and N. R. Co.* v. *United States,* 282 U. S. 740; *Robinson* v. *Lundrigan,* 227 U. S. 173; *United States* v. *Finnell,* 185 U. S. 236; *United States* v. *Tanner,* 147 U. S. 661. If it be the contention of the Federal Government that the excise is imposed on the bare act of "removal" or shifting of goods from one portion of the owner's premises to another, it might well be questioned whether such an arbitrary basis for an excise could con-

stitutionally be sustained, and certainly as a matter of construction of the Federal statute laying the excise such an interpretation is entirely without warrant. Admittedly a State may constitutionally lay a tax upon the storage and removal from storage of gasoline even though that gasoline is subsequently used as motor fuel in interstate commerce. *Edelman* v. *Boeing Air Transport,* 289 U. S. 249. In the *Edelman* case this Court expressly refrained from construing the statute involved and dealt solely with the question of constitutionality of the statute as construed. It held that storage and removal from storage were incidents of ownership and as the State had the right to tax the property itself so it could tax the incident of ownership. But it has never been the practice nor the policy of the Federal government to invade the field of direct property taxation. The whole history of the levy involved in the instant cases indicates it is and always has been an excise aimed at sale or consumption and not ownership. The express language of the act itself contradicts the contention that the excise is laid on the bare act of removal or that it is laid on storage. No mention is made of storage in the act nor does the statute purport to lay any tax on the bare act of "removal". The tax is laid on tobacco "sold" or "removed for consumption or sale". From the very earliest days the excise upon tobacco and tobacco products has been recognized to be a levy intended to be borne by the purchaser and consumer and not by the manufacturer or importer. The law enacted June 5, 1794, laid an excise on snuff and on sugar. Even though that portion of the levy which was laid with respect to sugar made no express mention of *sale* or removal for *consumption or sale,* Chief Justice Marshall, in *Pennington* v. *Coxe,* 2 Cranch 33, nevertheless construed the excise as one falling upon the consumer. Obviously, the present statute which expressly mentions "sale" and removal "for consumption

or sale" is even stronger in its indication of intent to place the burden upon the consumer. This intention is further indicated, if further indication be necessary, by the fact that where tobacco is to be exported and not consumed in this country express provision is made for exemption. U. S. Code, Title 26, Sections 785, 786, 787 and 788.

The recent case of *Trinity Farm Construction Co.* v. *Alice Lee Grosjean*, 291 U. S. 466, is clearly distinguishable from the instant cases. In the *Trinity Farm* case the user is the individual contractor, not the government. In the *Trinity Farm* case the government is neither the purchaser nor the user. In the instant cases the Commonwealth is both the purchaser and the consumer.

Whether or not the tax in the instant cases had its incidence in sale or in removal for consumption or sale, the burden is nevertheless direct. Manufacturing cost is determined and the price fixed when the tobacco tax impinges. The stamp tax is added to the price when the tobacco is sold. It does not form a part of the cost of production. If the tobacco were never sold nor removed for consumption or sale the tax would never be incurred. It in no sense forms a part of manufacturing cost nor can there be any doubt as a practical matter but what the Commonwealth, if the type of transaction in question is not taxable, can procure its tobacco for approximately half what it would pay if the tax must be paid. It is idle to talk about the remoteness of the tax when the obvious fact is, and judged by every rule of reason it must be, that the Commonwealth is in substance bearing it. No seller of tobacco could asume any such burden and survive. In the instant cases it would leave the company nothing for its tobacco if it bore the tax. It is perfectly apparent that the company selling the tobacco must increase its price by substantially if not precisely the amount of the tax and the purchaser is thereby directly affected. It is equally clear that

the Commonwealth could and would refuse to buy of any seller of tobacco that did not recognize that if the transaction were untaxed the amount of the tax should be eliminated so that the cost to the Commonwealth for tobacco would be that much below the customary price to others in transactions not tax free. The likelihood that substantially the whole, if not the whole, of the burden of the imposition will fall upon the State instrumentality goes to the very root and essence of the principle involved. It would be hard to conceive of any Federal tax that can be regarded as imposing a burden upon the Commonwealth, short of a direct levy upon it *per se*, if the levy involved in this case were not to be so regarded.

In *Graves* v. *Texas Co.*, decided by this Court May 18, 1936, U. S. Supreme Court, Law. Ed. Advance Opinions 1935-1936, page 824, this principle is clearly recognized. In that case a tax by the State of Alabama construed to be upon storing and withdrawing was held to be unconstitutional in respect to gasoline withdrawn for the purpose of sale to the United States for use in performing governmental functions. Indeed this Court went further and said, Lawyers Edition, page 827:

> "But, assuming that, by the Acts under consideration the State meant to tax mere storing, that purpose cannot be given effect in respect of the company's sales and deliveries to the United States without infringing the constitutional principle which safeguards the federal government against state taxation. Plainly, the sales and deliveries by the company to the United States necessarily include storing and withdrawal from storage. A tax upon anything so essential to the sale of the gasoline to the United States is as objectionable as would be a tax upon the sale itself. The validity of the tax is to be determined by the practical effect of enforcement. To apply any other test of constitutionality would be to treat 'a prohibition which

is general as if it were confined to a particular mode of doing the forbidden thing.' Brown *v.* Maryland, 12 Wheat. 419, 444, 6 L. Ed. 678, 687. As held in the Panhandle Oil Co. case (277 U. S. 222, 72 L. Ed. 858, 48 S. Ct. 451, 56 A. L. R. 583): 'A charge at the prescribed rate is made on account of every gallon acquired by the United States. It is immaterial that the seller and not the purchaser is required to report and make payment to the State. * * * The amount of money claimed by the State rises and falls precisely as does the quantity of gasoline so secured by the Government. It depends immediately upon the number of gallons.' So far as concerns the federal immunity from state taxation, a tax upon storing or withdrawal so involved cannot be distinguished from the tax on sales imposed by the Mississippi statute condemned as unconstitutional."

Conclusion.

It is respectfully submitted that the cases at bar are controlled by, and the decision of the Court of Claims below is opposed to, the decisions of this Court relied upon by the petitioners in the foregoing brief as therein set forth. If not, the case involves an important question of law which has not been but should be settled by this Court. For either reason, the petition for writs of certiorari to the Court of Claims to review these judgments should be granted.

Respectfully,

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